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Supreme Court of the United States

October Term, 1973

Nos. 73-1064 and 73-1065

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Petitioner,

vs.

UNITED STATES OF AMERICA and DAVID N. EDELSTEIN, Chief Judge, United States District Court for the Southern District of New York,
Respondents.

No. 73-1066

CRAVATH, SWAINE & MOORE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

SUPPLEMENTAL MEMORANDUM FOR CRAVATH AND IBM

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January 21, 1974

IN THE

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SUPPLEMENTAL MEMORANDUM FOR CRAVATH AND IBM

This supplemental memorandum is submitted to call attention to the following matters which were not available when the above review applications were filed on January 7, 1974, and which may make it unnecessary for this Court to consider the matter, at least for the present:

1. On January 7, 1974, counsel for Cravath and IBM were notified that the district court had issued a Memorandum (printed in the attached Appendix A) relating to

Cravath's July 16, 1973, application to intervene in the contempt proceeding against IBM. As elaborated below, that Memorandum (a) attempts to counter Cravath's assertions that the district court's failure formally to act upon Cravath's application to intervene constituted a denial, and states instead that the court has now concluded that the application has been (for five and one-half months) procedurally deficient, and (b) criticizes the making of the application but states that those views are "not intended to prejudice the applicant's right to bring on a motion to intervene in proper form". (App. A, at 6a)

2. Although this invitation to file a proper motion to intervene may be subject to some question in view of the circumstances, timing and substance of the Memorandum, it has been accepted at face value, particularly since the principles and rulings it announces suggest the necessity for vacation of the Contempt Order Against IBM. Thus this Court may again wish, as it has done before,* to defer consideration of the matter pending the disposition of the application which has been made in response to the district court's invitation. Or, if this Court does not wish to defer consideration, the district court's Memorandum strongly reconfirms the need for appellate scrutiny of the Waiver and Contempt Orders.

A. The circumstances and timing of the district court's Memorandum.

In seeking a stay from the Second Circuit against the running of the $150,000 a day fine imposed by the Contempt Order, IBM and Cravath committed to file in this Court on January 7, 1974, their papers to review the Waiver

* Review of the Waiver Order was deferred pending the Second Circuit's *en banc* decision of May 8, 1973 (see J.S. in No. 72-1173 at 10-11) and was subsequently again deferred pending the Second Circuit's review of the Contempt Order as suggested in counsel's letter of August 10, 1973, to the Clerk of this Court regarding Nos. 72-1173, 72-1661 and 72-1662.

and Contempt Orders and the denial of Cravath's application to intervene in the contempt proceeding to protect its work-product interest in documents covered by the Waiver Order. The Second Circuit granted the stay on January 2, 1974.

Accordingly, the review papers were printed over the weekend and filed in this Court on Monday, January 7—IBM's "all writs" petition to the district court (No. 73-1064), IBM's certiorari petition to the Second Circuit (No. 73-1065), and Cravath's Jurisdictional Statement (No. 73-1066). The Jurisdictional Statement asserts (at 15-16) that the district court's entry of the Contempt Order on August 1, 1973, and its continuing failure to act formally on Cravath's intervention application, constitutes a denial of that application. It also states (at 4, second footnote) that immediately after the December 17 decision of the Second Circuit, holding that the intervention application was not properly before it, counsel for Cravath reminded the district court of the application, but had received no response to date.

Meanwhile, unbeknownst to counsel, the district court filed the Memorandum on Friday, January 4, but counsel were not notified of it until almost noon on January 7.* The Jurisdictional Statement and other review applications were then on their way to Washington for filing to meet the commitment for filing on that day. As a result, they were filed without reference to the Memorandum, but the Clerk of this Court was concurrently informed about the Memorandum and was advised that it would be dealt with by a supplemental filing.

B. The substance of the district court's Memorandum.

The Memorandum replies to (and quotes) Cravath's assertions in the Second Circuit that the district court's

* The Memorandum is stamped as filed in the Clerk's office at 5:12 p.m. on Friday, January 4, but (apparently in view of the closing of the Clerk's office at 5:00 p.m. for the weekend) counsel were not notified of its existence until January 7.

continuing (5½ month) failure to act on the intervention application constitutes, when coupled with the Contempt Order issued against IBM, denial of the application. To this assertion the district court answers that it had failed to act on the application because it had been brought on by order to show cause, rather than by a regular motion returnable in ten days. Therefore, replied the court, it had been insufficient as to form under Local Rule 9(c)(4), because it was not accompanied by an affidavit stating why it was believed to be appropriate to proceed by order to show cause rather than by motion.*

We believe that this explanation, made at this late date, by the district court is inconsistent with reality and with the very first requirement of the Federal Rules of Civil Procedure that they shall be construed to secure the "just, speedy and inexpensive determination of every action."

The intervention petition, which was verified under oath, stated Cravath's need to intervene in the proceeding occurring that day because the Government threatened to "irreparably destroy the rights of Cravath in the subject matter of the proceeding" (J.S. 67a). This verified pleading setting forth the need for speed would seem to satisfy the purposes and meet the requirements of the local rule and we continue to maintain that the district court's inaction coupled with the outstanding $150,000 a day fine against IBM constitutes a denial of Cravath's application.

Nevertheless, Cravath has again requested the district court to grant its application. This was done pursuant to a statement at the close of the Memorandum. There the district court says that its criticism of the making of the application and its view that the intervention application was intended to "provide an appellate vehicle" is not "intended

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* Rule 9(c)(4) states:

"No order to show cause to bring on a motion will be granted except upon a clear and specific showing by affidavit of good and sufficient reasons why procedure other than by notice of motion is necessary."

to prejudice" Cravath's right to renew its application absent the procedural infirmity which the court found to have existed. Although the prior history of this proceeding is not reassuring, it is believed that this invitation must be accepted, particularly since re-application should, for the reasons stated below, result in a vacation of the Contempt Order, and may make it unnecessary for this Court to consider the matter at this time.

C. The reasons for believing that Cravath's re-application for intervention to the district court may be successful and obviate the need for this Court's consideration.

The re-application points out that the principles and rulings contained in the Memorandum necessitate vacating the Contempt Order against IBM. This is so for two reasons basically:

First, the procedures followed by the United States in initiating and prosecuting the contempt proceeding did not comply with the requirements stated in the district court's Memorandum (*see* pp. 6-7, *infra*). The law must be even-handed; it is not fair to bind one litigant by one set of rules while another is free to disregard them. Accordingly, the entire contempt proceeding was infected by the infirmity the district court has just announced.

Second, unless the district court's recognition of Cravath's right to apply to intervene is to be regarded as a meaningless formality or as an attempt to frustrate appellate review, that right must be to seek to intervene in a proceeding where Cravath's rights have not already been extinguished. Accordingly, the Contempt Order must be open to re-examination if the invitation to re-apply for intervention is to be more than an empty phrase.

For these reasons we respectfully suggest that this Court defer consideration of the applications now before it, pending the district court's disposition of the new application to intervene. We shall promptly inform the Court of that disposition.

D. In the event this Court chooses not to defer consideration of the matter, the district court's memorandum confirms the position taken by IBM and Cravath in their pending applications in this Court.

The Memorandum demonstrates the finality of the district court's denial of the July 16 application to intervene and further demonstrates the need for appellate scrutiny of the district court's misuse of its powers.

As to finality: the Memorandum makes it clear that there is no application before the district court for intervention by Cravath, and that it denied the prior application for intervention, finally and completely.

As to the need for appellate scrutiny: in handing down its Memorandum the district court acted *sua sponte,* ruled against Cravath on a ground never urged by the Government,* and inconsistent with the Government's position and procedure in the contempt proceedings, waited five and a half months to raise, for the first time, its own technical objection to the intervention application, and thus again demonstrated its desire to enforce its Waiver Order without appellate review and without regard for the substantial rights thereby extinguished.

The district court's application of a local rule to deny that Cravath's intervention application ever existed is fundamentally unfair and totally inconsistent with the district

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* Neither at the contempt "hearing" on July 16, 1973 nor at any time thereafter has there been an objection—indeed, even a suggestion—by the Government that Cravath's application was in any way procedurally deficient, let alone deficient under a local rule of the district court that was raised for the first time, *sua sponte,* by the district court five and a half months later. Moreover, at the "hearing" the Government did not suggest it needed additional time to respond. On the contrary, the Government sought to respond at the hearing "on the merits" of the application, but the district court ruled from the bench that the Government's "remarks about the [intervention] papers furnished to this Court today are stricken". (J.S. 43a; II App. F, at 112a)

court's treatment of the Government in the contempt proceeding—for if there was here a failure to follow any technical rule, the Government was guilty of the same fault. The Government commenced the contempt proceeding by an Order to Show Cause, which the district court signed the day it was submitted although there was no showing of the kind now required by the Memorandum why that expedited procedure (as distinguished from proceeding by Notice of Motion) was necessary. In fact, the district court later completely disregarded its local rules when, on its own initiative, it made a Government Notice of Motion in the contempt proceedings returnable on the very same day it was filed—despite the absence of any sworn reasons for urgency.

In each of these applications (Cravath's and the two by the Government) the moving party asserted that there was reason for speed and no opposing party objected—but none of those applications met the technical standard which the district court invoked on January 4, 1974, solely for the intervention application.

Thus, the district court, in order to vindicate its authority, has created one set of rules for the private litigants before it and ignored those rules for the Government. No judicial proceeding should hold the Government to a lesser standard than private litigants. Particularly is that so when the Government is prosecuting for contempt and where, as here:

> (i) the contempt sanction sought by the Government was unprecedented;
>
> (ii) the Government told the district court that its prior repeated representations that contempt was the appropriate way to seek appellate review of the Waiver Order, should not be "looked at or honored" (II App. B, at 15a); and
>
> (iii) the Government then opposed any appellate review of both the Contempt and Waiver Orders.

Contrary to the district court's criticism in its Memorandum, Cravath's intervention application followed the procedure suggested by this Court in *Reisman* v. *Caplin*, 375 U.S. 440, 449 (1964), and utilized in *Hickman* v. *Taylor*, 329 U.S. 495 (1947): IBM and Cravath have sought, in good faith and on an appropriate ground, appellate review of the district court's Waiver of Privilege and Contempt Orders. IBM and Cravath are, we submit, now entitled to such review and this Court should grant it.

CONCLUSION

For the reasons stated, this Court should either defer consideration of this matter pending disposition by the district court of Cravath's new application to intervene or this Court should grant review now.

Dated: January 21, 1974

Respectfully submitted,

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APPENDIX A

United States District Court

Southern District of New York

69 Civ. 200 (DNE)

UNITED STATES OF AMERICA,

Plaintiff,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant.

MEMORANDUM

EDELSTEIN, *Chief Judge:*

Cravath, Swaine & Moore (Cravath), attorneys representing defendant IBM, seeks to intervene in the above captioned action. The application for intervention pursuant to Fed.R.Civ.P. 24 is but another branch of the ever spreading tree of litigation emanating from this court's Pretrial Order No. 5.

The background and litigation history of Pretrial Order No. 5 was set out in this court's opinion of August 1, 1973, and, therefore, need not be repeated. *United States* v. *IBM*, 69 Civ. 200 (S.D.N.Y., Aug. 1, 1973). Nevertheless, some discussion of the circumstances leading up to the hearing held on July 16, 1973 pursuant to Local Civil Rule 14(b) is desirable.

On June 13, 1973 the United States Supreme Court issued an order refusing to stay Pretrial Order No. 5 and the mandate of the Court of Appeals. Thereafter, on June 25, 1973 this court, at the request of the United States, ordered IBM to show cause on June 28, 1973 why it should not be found in civil contempt for its continued refusal to comply with Pretrial Order No. 5. On the return date for the order to show cause the court heard argument on the question of contempt. At that time counsel for defendant requested that a hearing be held pursuant to Local Civil Rule 14(b), on the issue of IBM's contempt and the damage thereby occasioned.

By order dated July 3, 1973, the court scheduled a hearing pursuant to Local Civil Rule 14(b) for July 16. The hearing was "limited to the issues of the fine and damages to be assessed against defendant for its alleged contempt of this court's order, Pretrial Order No. 5 . . . ." Subsequently, defendant sought discovery from the Department of Justice with respect to the damages allegedly caused by its failure to comply with Pretrial Order No. 5. The Justice Department then moved for a protective order. After a hearing on July 10, the court granted plaintiff's motion for a protective order regarding IBM's noticed deposition of the Antitrust Division of the Department of Justice for July 11, and quashed a subpoena duces tecum also addressed to the Antitrust Division. Defendant, however, was "given leave to propound narrowly focused interrogatories and request for documents addressed specifically to the issue of damages to the United States occasioned by defendant's failure to comply with this court's Pretrial Order No. 5." Additionally, the court made it clear in the memorandum accompanying its order that if depositions became necessary, "then, on a proper application by IBM, such depositions will be permitted." In the same order the court severed the question of damages from the hearing scheduled for July 16, so that the discovery permitted by the court would not delay the hearing on the issue of a fine.

On July 16, 1973, the court conducted a hearing pursuant to Local Civil Rule 14(b), as limited by the orders of July 3 and July 10. On August 1, 1973, this court rendered its decision holding IBM in civil contempt and imposing a fine of $150,000 a day for its continued failure to comply with Pretrial Order No. 5.

Thereafter, IBM and Cravath sought appellate review of the contempt order in the United States Court of Appeals for the Second Circuit. The Court of Appeals stayed Pretrial Order No. 5 pending its determination of the appeal and application for an extraordinary writ.

On December 17, 1973, the Court of Appeals dismissed the appeal and denied the petition for mandamus. Additionally, the circuit court unequivocally stated that "Cravath's attempted intervention in the contempt proceeding is not properly before this court." *International Business Machines Corp.* v. *United States,* Nos. 73-2126-7, 73-2145-6 at 5639 (2d Cir., Dec. 17, 1973). Judge Oakes, writing for the majority, gave two rationales for this conclusion. First, contrary to the position asserted by appellants that this court implicitly denied the intervention motion, Judge Oakes found that "[t]he application for intervention was never determined by the court below, because the application was not filed until the morning of the hearing on July 16, 1973." *Id.*

Secondly, the appeals court concluded that "intervention questions like every other aspect of Government civil antitrust cases are reviewable only in the Supreme Court on direct appeal under the Expediting Act." *Id.* at 5639-640.

On December 18, 1973, this court received a letter from Simon H. Rifkind, Esq., a member of the law firm of Paul, Weiss, Rifkind, Wharton & Garrison, attorneys representing both IBM and Cravath, the applicant for intervention. The letter requested this court to set "a date and time for

a hearing on the intervention motion of Cravath, Swaine & Moore."

Although characterized as a "motion" by Mr. Rifkind, the intervention application was originally brought on by an order to show cause. The order to show cause was submitted to this court at 10:10 A.M. on the morning of July 16, 1973 and was made returnable at 11:00 A.M. that same day, the time at which the hearing under Local Civil Rule 14(b) was scheduled. When the hearing was convened, this court stated:

> At 10:10 this morning in my chambers I received a batch of papers. It should be clear that this recent application to intervene has not afforded the court an opportunity to review papers in the underlying documents. Accordingly, that application will not be heard now.

Transcript of July 16, 1973 at 2. The court is at a loss to understand why the application to intervene was submitted forty minutes before the requested return time. Cravath asserted before the court of appeals that its intervention application was timely because it was "forthwith filed" when it became apparent that the

> Government renounced its prior position and sought to block any appeal of Pretrial Order No. 5 by demanding devastating contempt sanctions against IBM, and resisting Cravath's application for a plainly appealable contempt order.
>
> When that unseemly reversal occurred, it became apparent—*for the first time* since Cravath began its journey to the appellate courts—that Cravath could not protect its own interests without intervening.

Memorandum on Behalf of Cravath, Swaine & Moore Concerning Denial of Its Motion to Intervene at 10, *International Business Machines Corp.* v. *United States,* Nos. 73-2126-7, 73-2145-6 (2d Cir., Dec. 17, 1973) (emphasis in original).

Even assuming *arguendo* that the Government's apparent change in position regarding a plainly appealable contempt order was the impetus for the application to intervene by Cravath, this does not explain why the application was submitted at the proverbial eleventh hour. IBM was served with this court's order to show cause why it should not be held in *civil* contempt for its failure to comply with Pretrial Order No. 5 on June 25, 1973. Consequently, Cravath had notice of plaintiff's intention to seek a *civil* contempt sanction against defendant at least twenty-days before the July 16 hearing. Moreover, viewing all the facts and circumstances surrounding the July 16 hearing most favorably to defendant, it was unequivocally clear as of July 10, when this court ordered the hearing scheduled for July 16 to go forward limited to the question of a coercive fine and severing the issue of damages so that IBM could obtain discovery, that this court was considering a civil sanction against defendant. Accordingly, it is difficult if not impossible to understand why Cravath failed to apply for intervention earlier.

Under Local General Rule 9(c)(2) motions must be served at least ten days prior to the return date. Had Cravath acted after being served on June 25, 1973 with this court's order to show cause, it would have had ample time to bring on its application for intervention by ordinary notice of motion. Even if it waited until July 10 to apply for intervention, it could have brought its intervention motion on by a procedurally appropriate order to show cause prior to July 16.

The court has never signed the order to show cause submitted on July 16. Local General Rule 9(c)(4) provides as follows: "No order to show cause to bring on a motion will be granted except upon a clear and specific showing by affidavit of good and sufficient reasons why procedure other than by notice of motion is necessary." Since the order to show cause why Cravath should not

be permitted to intervene as of right failed to comply with Local General Rule 9(c)(4), it will not be signed by the court.

Although the court agrees with the characterization of Judge Oakes that the intervention motion was merely a device "to permit the lawyers to be adjudged in token contempt to provide an appellate vehicle and thereby escape the thrust of *International Business Machines Corp. v. United States*, 480 F.2d *supra*." *International Business Machines Corp. v. United States*, Nos. 73-2126-7, 73-2145-6, at 5639 (2d Cir., Dec. 17, 1973), this view is not intended to prejudice the applicant's right to bring on a motion to intervene in proper form.

Dated: New York, New York
January 4, 1974.

David N. Edelstein

DAVID N. EDELSTEIN
Chief U.S.D.J.